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In the Supreme Court of the United States

October Term, 1978
No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,
Petitioner

v.

FRANCES B. DAVIS,
Respondent

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE

The Commonwealth of Pennsylvania has been a pioneer in recognizing the legitimate grievances of handicapped persons. As early as 1971, the State entered into the first consent agreement guaranteeing mentally retarded children a free public education.

Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971). This landmark agreement became the prototype for subsequent court decisions, the Education for All Handicapped Children Act of 1975, P.L. 94-142, and Subpart D of the regulations promulgated by the Department of Health, Education and Welfare (HEW) implementing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Thus, Pennsylvania has demonstrated a substantial interest in ensuring the provision of equal rights to the handicapped.

Moreover, Pennsylvania is deeply interested in the logical and effective enforcement of Section 504 from a variety of additional, but different perspectives.

Specifically, as parens patriae of the citizens of Pennsylvania, the Commonwealth is concerned that those of its citizens who suffer from handicaps do not additionally suffer discrimination from either their government or those who receive federal tax dollars in the form of grants. As an employer and provider of services, the Commonwealth is concerned that the rules governing its handling of handicapped employees and applicants are precise and, in addition, that they are logically and uniformly enforced. As a recipient and conduit of federal funds, the Commonwealth is, of course, concerned that the continued receipt of those funds is not unjustly impaired because of alleged violations of Section 504 and that procedures for instituting the cut-off of such funds are clearly delineated. Naturally, the Commonwealth is concerned that the tax dollars of its citizens are

not wasted in needlessly defending multiple actions alleging discrimination against a handicapped person brought in various administrative forums and in court. Finally, the Commonwealth must be concerned that Section 504 is not implemented in such a way that handicapped individuals are placed in situations where they are dangerous either to themselves or to other citizens of the Commonwealth.

With all of these concerns in mind, the Commonwealth seeks briefly to explain to the Court the impact that the decision of the Fourth Circuit Court of Appeals in *Davis v. Southeastern Community College,* 574 F.2d 1158 (1978), would have upon the Commonwealth and to urge reversal of that decision.

ARGUMENT

I. The Circuit Court's construction of the definition of "otherwise qualified handicapped individual" contravenes Section 504 of the Rehabilitation Act of 1973 and the implementing HEW regulations.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, states:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

It is the position of the Commonwealth of Pennsylvania that the federal courts are ill suited to be the initial forum to determine whether an individual handicapped person is or is not qualified to participate in a certain program or employment. This sort of sensitive factual issue should be determined first by the agency to which the handicapped person is applying and, if challenged, should thereafter be reviewed by the Department of Health, Education and Welfare.

Should Section 504 give rise to a private cause of action in federal court, it will be the court's role to

ultimately determine factual questions of this kind. The Commonwealth submits that the test used to determine this issue by the Fourth Circuit Court of Appeals is illogical, is at variance with the HEW regulations and would lead to absurd and harmful results for all concerned. The Commonwealth, therefore, joins petitioners in requesting that that test be struck down by this Court.

In this regard, the district court below ruled that an otherwise qualified handicapped person must "be otherwise able to function sufficiently in the position in spite of her handicap, if proper training facilities were suitable and available." *Davis v. Southeastern Community College,* 424 F. Supp. 1341, 1345 (E.D. N.C. 1976). The Circuit Court held this definition to be inconsistent with HEW's Section 504 regulations specifically 45 C.F.R. §84.3(k)(3) which contains the following definition of a "qualified handicapped person":

> With respect to post-secondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's educational program or activity. *Davis v. Southeastern Community College,* 574 F.2d 1158, 1161 (1978).

The Fourth Circuit went on to quote from the official Analysis provided by HEW for this definition which indicates that:

> Both academic and technical standards must be met by applicants to these programs. The

term "technical standard" refers to all non-academic admissions criteria that are essential to participation in the program in question. *Supra* at 1161.

The Fourth Circuit proceeded to hold:

> The district court erred by considering the nature of the plaintiff's handicap in order to determine whether or not she was "otherwise qualified" for admittance to the nursing program, . . . rather than by focusing upon her academic and technical qualifications as required by the newly promulgated regulations, *supra* at 1161 and * * * that the college must reconsider plaintiff's application for admission to the nursing program without regard to her hearing disability. *Supra* at 1160.

In doing so, the Fourth Circuit Court of Appeals wholly misconstrued the HEW regulations implementing Section 504 as those regulations define an "otherwise qualified handicapped person." What the Circuit Court failed to understand, but what additional HEW regulations make clear, is that, in this case, the ability to hear distinctly is indeed a technical qualification for participation in the student nursing program.

This mandate of the Circuit that a college entirely disregard the nature of the applicant's handicap is directly at odds with the HEW regulations. The Analysis of the HEW regulations specifically addresses this point, rejecting the *"but for"* test employed by the Fourth Circuit and making clear that

an "otherwise qualified handicapped person" is one who is qualified *"in spite of"* of his/her handicap:

> Paragraph K of Section 84.3 defines the term "qualified handicapped person". Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such result was not intended by Congress. In all the respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable. 45 C.F.R. Chapter 84, Appendix A, p. 376.

Were this Court to adopt the "but for" test enunciated by the Fourth Circuit for qualification of handicapped persons to be admitted to college, the nine state colleges operated by the Commonwealth of Pennsylvania might well find themselves required to admit the profoundly mentally retarded to graduate degree programs or the quadraplegic to forestry programs. There is no question that the Circuit Court's analysis of technical qualifications lacks logic and understanding and must, therefore, be reversed.

II. The Fourth Circuit misconstrued the extent to which Section 504 requires colleges and universities to modify their educational programs to accommodate the handicapped.

The Commonwealth does not dispute that at times it may be necessary, desirable and legally mandated to modify educational programs in order to allow qualified handicapped persons to participate in them. However, an important point must be made. The Fourth Circuit ordered the district court to consider on remand the plaintiff's contention that the college could be required to modify the nursing program so as to accommodate her and her hearing disability. The Circuit Court then quoted from two sentences of Section 84.44 (a) of the HEW 504 regulations entitled "Academic Requirements." *Supra* at 1162. Since the Circuit Court did not consider the HEW regulations' discussion of the meaning of "qualified handicapped person", it failed to address the core sentence of this regulation which states:

> . . . Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. . . . 45 C.F.R. §84.44-(a).

There should be no question that a college, such as a State College of Pennsylvania, should not be required to exempt handicapped persons from *es-*

sential course work in a degree program. Such an exemption obviously does a disservice not only to the other students in the program, but also to those individuals who later will rely upon the college's degree to assume that those who hold that degree have successfully completed certain course work.

Thus, for example, in Pennsylvania a liberal arts degree from a state college means that the holder of that degree has proficiency in at least one foreign language. Those who deal with holders of these degrees from a Pennsylvania State College have the assurance that they are hiring someone with such a proficiency. Yet, in Pennsylvania, at least one student has submitted that a cerebral palsy condition renders him incapable of taking a foreign language course in his liberal arts program and that he should be excused from that requirement by reason of Section 504.

Were Pennsylvania to follow the ruling of the Fourth Circuit in this regard, the Commonwealth would have to dilute this degree in order to accommodate a person who is or claims to be handicapped from pursuing precisely the goal that he seeks to achieve: a fully equal, quality education. Significantly, the Analysis of its regulations provided by HEW unequivocally states, to the contrary, that:

> This requirement . . . does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. 45 C.F.R. Chapter 84, Appendix A, p. 388.

Pennsylvania urges this Court to adopt the reasonable approach of HEW and reject the Fourth Circuit's construction.

III. Section 504 does not give rise to a private right of action in a federal court by a handicapped individual who has not exhausted his administrative remedies.

Even if this Court should imply a private right of enforcement under Section 504, it has not been properly exercised in this case, nor does the Fourth Circuit order its proper exercise. The Fourth Circuit has failed to note the absolute prohibition of judicial action pending the completion of administrative proceedings by HEW on a complaint filed under Section 504 at the administrative level. Section 45 C.F.R. §80.8(d) which is applicable to Section 504 proceedings, provides:

> No action to effect compliance by any other means authorized by law shall be undertaken until (1) the responsible department official has determined that compliance cannot be secured by voluntary means, (and) (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance. . . .

Some of the consequences of the failure by the Fourth Circuit to give effect to this regulation have already

been demonstrated in the above discussion of the Fourth Circuit's failure to consider the appropriate HEW 504 regulations in its decision in this case. Other consequences to entities such as Pennsylvania will be addressed more fully in Section IV of this brief.

In this situation, even should this Court find a private right of action, the appropriate remedy would be to suspend further court proceedings pending the filing of a complaint by plaintiff with HEW and a final determination by HEW on that complaint.

IV. If such a private right of action is implied, the handicapped applicant must first pursue and exhaust applicable HEW administrative remedies respecting individual complaints of discrimination.

The Commonwealth joins with the petitioners in their argument that this Court must hold that purportedly handicapped individuals must exhaust their administrative remedies with HEW under Section 504 before being allowed to bring actions in federal court. No restatement of that argument will be made here. It must be said, however, that confusion alone will ensue if the implementing federal agency is not allowed to bring its expertise to bear on this issue in the first instance.

The absence of any exhaustion requirement has encouraged multiple complaints arising out of the

same action affecting the same purportedly handicapped individual. Pennsylvania is already facing the problem of having handicapped and purportedly handicapped individuals file multiple complaints against it before various agencies, arising out of the same job action or other action which affects those individuals. No attempt will be made to be exhaustive. For example, one Susan L. has filed employment discrimination charges with HEW under Section 504 of the Rehabilitation Act of 1973, the United States Department of Labor under Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793, and the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act. Horace B. has filed employment discrimination charges arising out of one job action with the Pennsylvania Human Relations Commission (which dismissed those charges), the Equal Employment Opportunity Commission under Title VII (which dismissed those charges), the Department of Labor under Section 503 and the Vietnam Era Veterans' Readjustment Act (which Department is currently investigating the claimant's allegations) and HEW under Section 504 (which is also currently investigating the allegations made).

As difficult as this situation is and as wasteful of the taxpayers' money, it can only be rendered worse should this Court decide that it is not necessary for a handicapped person to exhaust the administrative procedures available to him before bringing an action in federal court to vindicate his rights under Section 504. Only by allowing that administrative and judicial review process to proceed in its proper order, can

premature and misconceived decisions be avoided and the rights of the handicapped be realized to the benefit of themselves and society.

Respectfully submitted,

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